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## PRESUMPTION OF THE FOREIGN LAW.

A CONTRACT made in a foreign state and to be performed there, is, by the usual rule, governed by the law of the foreign state as distinguished from the law of the forum where suit may happen to be brought upon it. The law of the foreign state governs not alone as to the validity of the contract, its legal effect, and the construction of its terms, but also as to the sufficiency of defenses to a suit upon it. Thus, if the suit in the forum be against a surety on a note, the giving of time to the principal debtor is a defense only provided the law of the foreign state recognizes it to be so.<sup>1</sup> In practice, however, in the various jurisdictions of the United States, it is believed that many suits on foreign contracts are tried without either party alleging or proving in the slightest degree the foreign law which admittedly governs and is a necessary part of the plaintiff's case and the defendant's defense. Upon what principle can this neglect to prove a relevant fact in the case be justified? It is said usually that the court of the forum supplies the lack of proof by a presumption. Under what circumstances, then, does the court of the forum make a presumption as to the foreign law, and what is the presumption which it makes?

It is fundamental that courts will not, as a general rule, take judicial notice of what the foreign law is, where that becomes relevant. It is equally fundamental that, in general, courts do not presume what the foreign law is. This means no more than that, as a

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<sup>1</sup> Howard v. Fletcher, 59 N. H. 150; Tenant v. Tenant, 110 Pa. St. 478; 3 Beale, Cases on Conflict of Laws, 544.

general rule, there is no short cut to relieving a person who has the burden of proving a certain case or defense in which the foreign law is a fact to be proved like other facts, from the usual burden of going forward in the first instance with evidence upon that point. The burden of going forward, then, is shifted to one who has not the burden of proof upon the whole case only by some especially and particularly defined rule,—that is, where it is done, it is by way of exception to a general rule and not the rule itself; or, to use a more usual form of expression, the court of the forum will make a presumption as to what the law of the foreign state is, only by way of exception to the general rule. A careful review of a very considerable number of authorities leads me to conclude that there are three possible rules for determining when the court of the forum will make a presumption as to the law of the foreign state, and what presumption if any it will make; or as I would prefer to say, there are three possible rules which indicate when the court of the forum will shift the burden of going forward with evidence as to the foreign law upon the party not having the burden of proof of the whole issue of which the foreign law is a part.

The first position is as follows: when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, the court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both; otherwise there is no presumption at all.

This rule rests upon the existence of a logical distinction between the case where the forum takes judicial notice that the foreign state has fundamentally the same system of law as the forum and that where the court of the forum takes judicial notice that the foreign state has fundamentally a different system of law. The cases make pretty plain the way the courts recognize which of the American and European states have fundamentally the common-law system and those which have not. Where the forum, like Illinois, is composed of territory belonging to one or more of the original thirteen colonies of Great Britain, and actually settled by those who brought the common law with them, it can properly make a presumption in regard to the law of foreign states having a common origin with it.<sup>1</sup> It may, therefore, assume the common law to prevail in

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<sup>1</sup> *Miller v. McIntyre*, 9 Ala. 638; *McAnally v. O'Neal*, 56 Ala. 299 (indulging the presumption with respect to Georgia); *Gluck v. Cox*, 75 Ala. 310 (indulging the presumption with respect to Mississippi); *Peet v. Hatcher*, 112 Ala. 514; *Norris v. Harris*,

England,<sup>1</sup> Provinces of Canada<sup>2</sup> whose jurisprudence is judicially known to be based upon the common law, and all that part of the territory of the United States east of the Mississippi River, excepting Louisiana and Florida.<sup>3</sup> Illinois has in fact made this presumption, and may very properly go farther, following Judge Field (afterwards Associate Justice of the United States Supreme Court) in *Norris v. Harris*,<sup>4</sup> and indulge a similar presumption as to the existence of the common law "in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where in fact the population of the new state upon the establishment of government was formed by emigration from the original states."<sup>5</sup> As to Texas, Florida,<sup>6</sup> and Louisiana<sup>7</sup> it must take judicial notice that the fundamental law there is the civil law. As to Texas<sup>8</sup> in particular the court

15 Cal. 226. See also *Tinkler v. Cox*, 68 Ill. 119 (Ind.); *Schilee v. Guckenheimer*, 179 Ill. 593 (Ohio).

<sup>1</sup> *Stokes v. Macken*, 62 Barb. 145 (N. Y.).

<sup>2</sup> *Dempster v. Stephen*, 63 Ill. App. 126. But in *Owen v. Bowle*, 15 Me. 147, the court refused to indulge the presumption that the common law of England prevailed in the Province of New Brunswick.

<sup>3</sup> See cases in note 1, p. 402.

In Missouri it appears to be the rule that no presumption can be indulged excepting in states which prior to becoming members of the Union were subject to the laws of England: *Silver v. Kansas City, St. L. & C. R. Co.*, 21 Mo. App. 5 (denying presumption with respect to Kansas); *Witaschek v. Glass*, 46 Mo. App. 209; and *Bain v. Arnold*, 33 Mo. App. 631 (denying presumption with respect to Kansas); *Bahrydt v. Alexander*, 59 Mo. App. 188 (denying presumption with respect to Iowa); *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 147 (denying presumption with respect to Kansas); *Clark v. Barnes*, 58 Mo. App. 667 (denying presumption with respect to Arkansas); *Searles v. Lum*, 81 Mo. App. 607 (indulging presumption with respect to Mississippi).

<sup>4</sup> 15 Cal. 226, 252.

<sup>5</sup> The Illinois cases have clearly adopted this principle: *Crouch v. Hall*, 15 Ill. 263 (Mo.); *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427 (Ia.); *Miller v. MacVeagh*, 40 Ill. App. 532 (S. D.); *Lipe v. McClevy*, 41 Ill. App. 59 (Col.).

See also *Cressey v. Tatom*, 9 Ore. 541 (indulging presumption with respect to law of state of Illinois); *Buchanan v. Hubbard*, 119 Ind. 187, 191, 21 N. E. Rep. 538 (indulging presumption with respect to Kansas).

<sup>6</sup> *Norris v. Harris*, 15 Cal. 226, 253; *Equitable Bldg. v. King*, 37 So. Rep. 181 (Fla.) (no presumption as regards the law of Georgia).

<sup>7</sup> *Norris v. Harris*, *supra*; *Sloan v. Torrey*, 78 Mo. 623; *Peet v. Hatcher*, 112 Ala. 514; *Sims v. Southern Express Co.*, 38 Ga. 129, 132; *Kennelbrew v. Southern Auto Co.*, 106 Ala. 377, 17 So. Rep. 545.

<sup>8</sup> *Castleman v. Jeffries*, 60 Ala. 380; *Flato v. Mulhall*, 72 Mo. 522; *Norris v. Harris*, 15 Cal. 226, 253; *Brown v. Wright*, 58 Ark. 20; *Garner v. Wright*, 52 Ark. 385.

On the same principle Texas will make no presumption that the law of a sister state, with a common law system, is a particular rule of the common law. There is a legion

will take judicial notice that it has fundamentally, not the common law system of jurisprudence, but that of the civil law. This appears from the fact as stated by Judge Field<sup>1</sup> that Texas "was an independent country at the time of its accession to the United States — having laws of its own, not being carved out of the ancient colonial provinces of England, like the original thirteen states, or formed by emigration into an uncultivated country from those states, but from a Mexican province by a successful revolution against the Republic of Mexico." So with regard to Mexico,<sup>2</sup> France,<sup>3</sup> and other wholly foreign countries.<sup>4</sup>

If the foundations of the legal system of the forum and of the foreign jurisdiction are judicially noticed to be the same, then the court of the forum presumes that it is the same as that which the fundamental system upon which the law of the forum and of the foreign state is based, recognizes it to be. This most often occurs in the United States, where the law of the forum and of the foreign state are both noticed to be fundamentally based on the common law of England. Thus, if the English common law were noticed to be the basis of both the law of the forum and the foreign state, the rule which the forum declares or recognizes to be the rule of the common law<sup>5</sup> would be presumed to be the law of the foreign jurisdiction, and that too although the legislature of the forum had abolished that rule of the common law by statute. In terms of the burden of going forward with evidence, the rule amounts to this: That under the circumstances mentioned the party desiring to show that the foreign law is different from the rule of the common law has the burden of going forward with evidence. This is the position which the Supreme Court and Appellate Courts of Illinois have unequivocally taken. Thus, where a married woman in a sister common law state, having, subsequently to the Illinois Married Women's Acts of 1861 or 1872,

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of cases to this effect (67 L. R. A. 53). See, however, the recent one of *Blethen v. Bonner*, 53 S. W. Rep. 1016 (Tex.).

<sup>1</sup> *Norris v. Harris*, 15 Cal. 226, 253.

<sup>2</sup> *Banco de Sonora v. Bankers Mutual Casualty Co.*, 100 N. W. Rep. 532 (Ia.).

<sup>3</sup> *In re Hall*, 61 N. Y. App. Div. 266, 70 N. Y. Supp. 406.

<sup>4</sup> *Aslanian v. Dostumian*, 174 Mass. 328 (*Asiatic Turkey*); *Savage v. O'Neal*, 44 N. Y. 298 (*Russia*); *Male v. Roberts*, 3 Esp. 163 (*Scotland*); *Thomas v. Ketcham*, 8 Johns. (N. Y.) 190 (*Jamaica*).

<sup>5</sup> See especially *Patillo v. Alexander*, 30 S. W. Rep. 644 (Ga.). The law of Tennessee was assumed to be the same as the State of Georgia held the common law to be, although the rule of the common law recognized by Georgia was different from the rule of the common law recognized by Tennessee.

acquired personal property which she claims as her own, brought the same to Illinois, the courts of that state will assume that the common law controls and that the personal property or chattels belong to the husband by virtue of the marriage.<sup>1</sup> So, where a contract for the sale of land is governed by the law of Kansas, the Illinois court will assume the validity of the contract by that law, but cannot presume that any Statute of Frauds like that in force in Illinois is in force in Kansas. The Statute of Frauds of Kansas must be alleged and proved and in the absence of that proof or the going forward with evidence to that effect, the plaintiff may have specific performance of the contract in Illinois.<sup>2</sup> So, in the case of contracts bearing rates of interest above the usual legal rate, but governed by the law of a sister common law state, the courts of Illinois assume the general common law rule in favor of the validity of contracts to be in force in the foreign state. They will not assume any foreign law of usury similar to the Illinois statute, but will require the foreign usury law to be proved specifically. Hence, in the absence of plea and proof of the foreign law there can be no defense of usury.<sup>3</sup> In the same way the common law was presumed to be in force in Ohio, so that an option contract governed by the law of Ohio was held valid, although such contract by the statute of Illinois would be unenforcible.<sup>4</sup> The posi-

<sup>1</sup> *Tinkler v. Cox*, 68 Ill. 119; *Van Ingen v. Brabrook*, 27 Ill. App. 401; *Miller v. MacVeagh*, 40 Ill. App. 532; *Lipe v. McClevy*, 41 Ill. App. 59.

<sup>2</sup> *Miller v. Wilson*, 146 Ill. 523; *Fireman's Ins. Co. v. Kuessner*, 164 Ill. 275. See also *Raphael v. Hartman*, 87 Ill. App. 634.

<sup>3</sup> *Smith v. Whitaker*, 23 Ill. 367; *Dearlove v. Edwards*, 166 Ill. 619. Note the distinction taken by the Appellate Court in *Robinson v. Holmes*, 75 Ill. App. 203.

Observe also that where the plaintiff sues on a foreign contract in which no interest is provided for after maturity, courts will recognize the common law validity of the contract and the right to recover a fair rate of interest after maturity as damages. *Deem v. Crume*, 46 Ill. 69; *Hall v. Kimball*, 58 Ill. 58; *Heiman v. Schroeder*, 74 Ill. 158; *Mo. Riv. Tel. Co. v. Nat. Bank*, 74 Ill. 217; *Downey v. O'Donnell*, 92 Ill. 559; *United Workmen et al. v. Zuhlke*, 129 Ill. 298; *Heissler v. Stose*, 131 Ill. 393; *Whittaker v. Crow*, 132 Ill. 627. But a particular rate of interest allowed by a foreign statute higher than that cannot be allowed without actual proof of the foreign law; *Morris v. Wibaux*, 159 Ill. 627, 652; *Chumasero v. Gilbert*, 24 Ill. 293.

<sup>4</sup> *Schlee v. Guckenheimer*, 179 Ill. 593. See also *Shannon v. Wolf*, 173 Ill. 253, and *Ferris v. Commercial Nat. Bank*, 158 Ill. 237.

Observe also that in *Dalton v. Taliaferro*, 101 Ill. App. 592, 598, "convey and warrant" in a deed concerning Iowa Lands and governed by Iowa law did not contain a covenant of warranty because it did not by the common law, and in the absence of proof of the Iowa law the common law obtained, although contrary to the Illinois statute.

In *County of Joe Daviess v. Staples*, 108 Ill. App. 539, judgment for a physician

tion thus taken by the Illinois courts is in accordance with that sustained by the large majority of jurisdictions of the United States, namely: Colorado, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, New Hampshire, New Jersey, New York, North Carolina, Oregon, South Carolina.<sup>1</sup>

It is obvious that the presumption or ground for shifting the burden of going forward with evidence of the foreign law indicated by the above cases rests upon a purely rational basis. It exists because, from the taking judicial notice of the existence of the same system of law in the foreign state as that which exists in the forum and the knowledge of the court of the forum of what the rules of that system are, a rational and permissible inference arises as to the law of the foreign state sufficiently strong to warrant the shifting of the burden of going forward with evidence of the foreign law on whoever would contradict this inference; or, as we more often say, the court of the forum presumes that the foreign law is the same as the rule of the fundamental system at the basis of the law of the forum and of the foreign jurisdiction. Suppose, then, the court of the forum judicially notices that the fundamental system of the law of the foreign state is not the same as that of the forum. Suppose, for instance, that the Illinois forum recognizes that Texas has fundamentally not a common law, but a civil law system of jurisprudence. What result is naturally reached? Of course, under such circumstances, there can be no presumption that the law of the foreign state is the rule of the common law.<sup>2</sup> What then? The rational ground for shifting the burden of going forward or the presumption, has failed. The court of the forum has nothing upon which to act. He who had the burden of proving a case or a defense, and who, therefore, in the ordinary course had the burden of going forward in the first instance with evidence to prove the facts necessary to sustain his case or his defense, has

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suings in Illinois upon a contract for professional services made in Iowa was sustained. The defense that the physician did not prove he was licensed to practise in Iowa failed because by the common law no such license was necessary, and the common law was presumed to be the law of Iowa in the absence of proof to the contrary, although by the statute modifying the common law in force in Illinois, such license was necessary.

<sup>1</sup> See note in 67 L. R. A. 42-55, where the law of each state is summarized and the authorities given.

<sup>2</sup> *Norris v. Harris*, 15 Cal. 226, 253; *Flato v. Mulhall*, 72 Mo. 522; *Brown v. Wright*, 58 Ark. 20; *Garner v. Wright*, 52 Ark. 385. See also other cases cited, *supra*, p. 403, notes 6-8, p. 404, notes 1-3.

failed to sustain that burden of going forward. He has consequently failed to sustain his burden of proof. He must suffer accordingly. His case or defense must fail wholly or in part, as the case may be. This is the position taken by the following cases:

*Male v. Roberts*:<sup>1</sup> Here the plaintiff sued in England on a contractual obligation governed by the law of Scotland. The plaintiff was non-suited because he failed to prove his case on the facts. In the course of the trial, however, it appeared that the defense relied on was infancy, and it was contended for the defendant that the law of Scotland should not be presumed to be different from that of England so far as the defense of infancy is concerned. Lord Eldon, however, ruled that whether infancy was a defense depended upon the law of Scotland, and that in the absence of proof of that law as a fact the defense would fail. The law of Scotland could not be presumed to be the same as the law of England.

*Thompson v. Ketcham*:<sup>2</sup> Contract sued upon in New York was governed by the law of Jamaica. The plea was the general issue. Under it the defense of infancy was attempted to be maintained. It failed because the law of Jamaica respecting the defense of infancy had not been proved, and the burden of going forward with evidence in regard to the law of Jamaica was upon the defendant who had the affirmative upon the whole defense of infancy. Chief Justice Kent said: "The next question is, which party was bound to prove the law of Jamaica. The court cannot know, *ex officio*, what are the rights and disabilities of infants, or when infancy ceases, by the provincial law of Jamaica. These questions depend much upon municipal regulations; and what the foreign law is, must be proved, as a matter of fact. This was so ruled by Lord Eldon in *Male v. Roberts*.<sup>3</sup> The defendant was bound to make out a valid defense, and it, therefore, lay with him to show that his plea of infancy was good by the law of Jamaica. The court is not to know that fact, without proof; and *the good sense and logic of pleading show, that it is the duty of the party who interposes a defense to a contract, otherwise binding, to prove everything requisite to the validity of the defense.* It was enough for the plaintiff to rely upon his demand, until it had been legally met by the plea. If the defendant had specially pleaded infancy, he ought to have accompanied it with an averment, that by the law of Jamaica he was an infant, and the contract not binding upon him. *As the defendant did not prove what the law of Jamaica was on the subject, he did not make out his defense, and the plaintiff is entitled to judgment.*"

*Leach v. Pillsbury*:<sup>4</sup> A son died domiciled in Louisiana, leaving \$1,000 debt due him. This amount was sent by the debtor to New Hampshire to

<sup>1</sup> 3 Esp. 163 (1800).

<sup>3</sup> 3 Esp. 163.

<sup>2</sup> 8 Johns. (N. Y.) 190 (1811).

<sup>4</sup> 15 N. H. 137 (1844).

the deceased's brother, who is called the trustee. By the New Hampshire law the deceased's father was entitled as one of the next of kin to part of his estate. A creditor of the father attached in New Hampshire the money in the hands of the trustee. He failed to maintain the attachment, and the trustee was discharged because the devolution of the property was governed by the laws of Louisiana and no proof was made on the part of the creditor that by that law the father had anything. The burden of proof of the whole case was on the creditor of the father to prove that the father was entitled, and the court held that the burden of going forward with evidence was on him also.<sup>1</sup>

*Aslanian v. Dostumian*:<sup>2</sup> Action of contract to recover the equivalent of money paid by the plaintiff to the defendants for a draft in favor of a third person payable at Harpoot in Turkey in Asia. The plaintiff relied upon a contract to re-pay the same if the draft was not paid by the drawee. One line of defense was that the defendants' contract was to pay provided the drawees did not pay and provided also all steps were taken to charge the drawers. The draft was governed by the law of Asiatic Turkey. In support of this line of defense, therefore, the fact became material whether the law of Asiatic Turkey, like the law of Massachusetts, required protest of drafts in case the drawees refused to pay in order to hold the drawers. There was no evidence in regard to the law of Asiatic Turkey on this point. It was assumed that the trial judge had in substance charged that the jury "had no right to presume that the law of Harpoot was similar to ours." Exceptions to this charge were overruled. Holmes, C. J., indicated that the law merchant in its widest interpretation was merely a vaguely defined portion "of the law of European countries, having the Roman and the Frankish law for its parents," and that "it is not to be presumed that either the Roman or Frankish law shaped the native law of Turkey. Still less is it to be presumed that Massachusetts modes of dealing with details prevail there when they notoriously vary even in European countries." Finally the learned judge concludes as follows: "If, as would seem from some of the text-books and encyclopædias, the European law of negotiable paper is known in Turkey, it is by recent legislative adoption or imitation of the French Code de Commerce, and *the fact ought to be proved by the party who wishes to profit by it*. Whether protest is necessary upon such an instrument as the draft in this case, and even whether an acceptance of it would be recognized as valid under the supposed Turkish Code, is to be settled not by presumption, *but by proof*."

*In re Hall*:<sup>3</sup> The question was whether a marriage had been consummated in France between two persons not citizens of or domiciled in France

<sup>1</sup> See also *McDonald v. Myles*, 12 Smedes & M. 279 (Miss.).

<sup>2</sup> 174 Mass. 328 (1899).

<sup>3</sup> 61 N. Y. App. Div. 266, 273 (1901).

at the time. There was evidence of the law of France relating to marriage, and the ceremony in question did not comply with it. It was contended, however, that the French law proved did not apply to foreigners temporarily in France, and that hence there was no proof of the law of France, and hence the law of New York state must be applied under which a good common law marriage was shown. This position the court refused to take. The court said: "Assuming, then, for the [sake of] argument, that the formalities required by the laws of France do not apply to foreigners temporarily in France, there is no proof that the common law is there applicable so as to render valid a common-law marriage. In fact the court will take judicial notice that the common law is not and never was in force in France." Hence the validity of the marriage was held not to be established.

Observe, however, that there is a qualification of this doctrine, so natural and so frequently taken for granted that its existence is almost imperceptible. Some essentially fundamental and rational principles of law, which from their nature may be assumed to exist in the system of law of every civilized country, may be relied upon without proof — that is, the burden of going forward with evidence of the foreign law is upon the person who relies upon the foreign law being in conflict with such essentially fundamental and rational principles of conduct. For instance, we may say that the court of the forum will not require in the first instance proof that the promises which the common law system recognizes as creating a contract make a valid contract under the foreign law, or that payment is a good defense, or that there is an action for injury to the person caused by negligence. Thus, in *Thompson v. Ketcham*,<sup>1</sup> *supra*, Chief Justice Kent, while holding that the defense of infancy failed because the foreign law allowing such a defense was not proved, allowed the plaintiff to recover, although the general issue was pleaded and the plaintiff gave no proof that under the foreign law the contract declared upon was valid.<sup>2</sup>

It is believed, however, that a presumption or shifting of the burden of going forward with evidence based upon this ground does not carry very far. For instance, while it might be recognized that all civilized nations have some rule as to the disability of infants, there is a direct denial that the defense of infancy, as

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<sup>1</sup> 8 Johns. (N. Y.) 190.

<sup>2</sup> See also *Mackey v. Mex. Cen. R. R.*, 78 N. Y. Supp. 966, where the plaintiff in a suit for personal injuries caused by the defendant's negligence was allowed to indulge in the "presumption that the right to compensation for such injuries is recognized by the laws of all countries." The Mexican law here governed.

formulated by the common law, is so universally adopted in foreign countries that it would be assumed to exist in a foreign country not having a common law system of jurisprudence. In *Male v. Roberts*<sup>1</sup> Lord Eldon denied its existence in Scotland, while in *Thompson v. Ketcham*<sup>2</sup> Chief Justice Kent refused to assume its existence in Jamaica. The rule that the surety is discharged by the giving of time to the principal debtor is, it is submitted, very clearly not of so fundamental and rational a nature and so inherent a part of the system of jurisprudence of every civilized country, that the court of the forum will shift the burden of going forward with proof of the foreign law to the party wishing to prove that such rule does not exist. The rule which discharges the surety by the giving of time to the principal debtor is in fact more unusual and less rational from the point of view of systems of jurisprudence in general, than the rule which gives infants a defense to suits on their contracts according to the common law rule. The very fact that the surety is discharged by any the least extension of time, even though the surety is not in the least damaged by it, has been pointed out as an illogical and irrational extreme. It is this character of the rule which makes it impossible for a court to infer that, like a defense of payment, it is part of the law of every civilized country.

The second position is that the law of the forum (even though it be statutory) is always applicable in the absence of proof of the foreign law.

In the application of this rule it is entirely unnecessary to make the slightest distinction between whether the foreign state is one which has fundamentally the same system of law as the forum or not. The rule is a definite one in regard to all cases where the foreign law is involved and has not been proved, and where the forum has any law on the subject. This position seems to have been definitely and unequivocally taken in Texas,<sup>3</sup> Louisi-

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<sup>1</sup> 3 Esp. 163.

<sup>2</sup> 8 Johns (N. Y.) 190.

<sup>3</sup> Observe the following cases where the fundamental system of the foreign law was the same as Texas, and where Texas applied its own statutory law as distinguished from the rule of the fundamental system of law common to both the law of Texas and the foreign state: *Burgess v. Western U. T. Co.*, 46 S. W. Rep. 794 (Tex.) (Texas statute applies in the absence of proof of the Louisiana Law which governed); *Pauska v. Daus*, 31 Tex. 67 (statute law of Texas in the absence of proof of Mexican law will govern, Mexico having the same law fundamentally as Texas—that is, the civil law; *Mexican Cen. R. R. Co. v. Marshall*, 91 Fed. Rep. 933; *Mexican Cen. R. R. Co. v. Glover*, 107 Fed. Rep. 356). On the other hand, there is a great mass of cases where

ana,<sup>1</sup> California,<sup>2</sup> and Iowa.<sup>3</sup> Sometimes the above rule is stated directly in the form indicated. Sometimes it is stated as a presumption that the foreign law is the same as that of the forum. Put in the terms of going forward with evidence, the rule amounts to this: That when the existence of the foreign law becomes important, the burden of going forward with evidence of that fact is not necessarily upon him who has the burden of proof of the facts in respect to which the foreign law is to be invoked, but that it is on whichever party wishes to show that the foreign law differs from the law of the forum, whatever that may be — whether statutory or otherwise. In many jurisdictions the rule has thus far been applied only where the foreign state, the law of which is in question, is one of the states of the United States which the court of the forum might judicially notice has the same system of law as the forum,<sup>4</sup> —

the law of one of the United States having a fundamental or common law system governs, and where the Texas court refused to make any presumption as to what the law of the foreign state was, and applied the law of the forum in the absence of actual proof of the foreign law: *Blethen v. Bonner*, 53 S. W. Rep. 1016 (Tex.). Also 67 L. R. A. 53 for more Texas cases.

<sup>1</sup> Observe the following cases where the fundamental system of the foreign law was the same as Louisiana, and where Louisiana applied its own statutory law as distinguished from the rule of the fundamental system of law common to both the law of Louisiana and the foreign state: *Kuenzi v. Elvers*, 14 La. Ann. 392 (Brazil law governed, Louisiana statute prevailed); *Bonneau v. Poydras*, 2 Rob. 1 (La.); *Atkinson v. Atkinson*, 15 La. Ann. 491. On the other hand, there is a great mass of cases where the law of one of the United States having a fundamental or common law system governs, and where the Louisiana court refused to make any presumption as to what the law of the foreign state was, and applied the law of the forum in the absence of actual proof of the foreign law: 67 L. R. A. 47.

<sup>2</sup> Observe the cases where the fundamental system of the foreign law was the same as that of California, and where California applied its own statutory law as distinguished from the rule of the fundamental system of law common to both the law of California and the foreign state. A large number of these cases will be found collected in 67 L. R. A. 43. On the other hand, where the fundamental systems of law in California and the foreign state were different, the California court refused to make any presumption as to what the law of the foreign state was, and in the absence of actual proof of the foreign law, applied the law of the forum: *Cavallaro v. Texas & P. Ry.*, 110 Cal. 348; *Norris v. Harris*, 15 Cal. 226; *Loaiza v. Superior Court*, 85 Cal. 11.

<sup>3</sup> The same situation is to be found in Iowa. Cases collected in 67 L. R. A. 46. See also *Barringer v. Ryder*, 119 Ia. 121; *Banco de Sonora v. Bankers Mutual Casualty Co.*, 100 N. W. Rep. 532 (Ia.).

<sup>4</sup> *Kansas: Mutual Home & Savings Ass'n v. Worz*, 67 Kan. 506. See also 67 L. R. A. 46.

*Nebraska: Scroggin v. McClelland*, 37 Neb. 644; *Fisher v. Donovan*, 57 Neb. 361; *Peoples Building Loan & Savings Ass'n v. Backus*, 2 Herdman (Neb.), 463. See also 67 L. R. A. 50.

*i. e.*, the common law. But if such is the rule under these circumstances, *a fortiori* it may properly enough be the same when the foreign state is one which is recognized as having a wholly different system of law from that of the forum.<sup>1</sup> Perhaps cases in some jurisdictions will be found where the fundamental system of law in the foreign state was recognized to be different from that of the forum, but where in the absence of proof of the foreign law it was held that the *lex fori* was taken as a guide.<sup>2</sup> Here also we should, in the absence of anything to the contrary, naturally expect the same results even where the foreign state is one which may be recognized as having the same fundamental system of law with the forum.

This second view seems not to rest upon any particularly rational inference from the facts of which the court takes judicial notice. There is certainly nothing to warrant the court in saying that there is any probability that the law of a sister common law state is like the statutory law of the forum. How much less, then, is there any rational ground for supposing that the law of a foreign state, like Mexico or Chili, is like the statutory law of the forum of one of the states of the United States having a common law system of jurisprudence. The second view seems to rest upon the necessity of having a general rule so simple and unqualified that it may always be known who has the burden of going forward with the proof of the foreign law. From the point of certainty it may be admitted that it is a good rule. It is submitted, however, that it throws an unjust burden upon the one who has not naturally the burden of going forward with evidence. Thus, suppose the law of Chili governed in an action in Illinois against a surety, and the defendant claims a discharge because of the giving of time to the principal debtor. According to the second view, although the burden of proof of the whole of the defense of the giving of time is

North Dakota: 67 L. R. A. 52.

Pennsylvania: *Peter Adams Paper Co. v. Cassard*, 206 Pa. 179; *Linton v. Moorhead*, 209 Pa. 646. See also 67 L. R. A. 52.

South Dakota: 67 L. R. A. 53.

Tennessee: 67 L. R. A. 53.

Wisconsin: *Second National Bank v. Smith*, 118 Wis. 18. See also 67 L. R. A. 55.

Canada: 67 L. R. A. 55.

<sup>1</sup> Of course it is perfectly possible that a court might take the position that there was no presumption at all, as under the first view.

<sup>2</sup> *Equitable Building & Loan Ass'n v. King*, 37 So. Rep. 181 (Fla.); *Wilhite v. Skelton*, 82 S. W. Rep. 932 (Ind. Ter.).

upon the defendant, yet the plaintiff must go to the expense and trouble of going forward in the first instance with evidence tending to prove that by the law of Chili there is no such defense, when the probabilities are all in favor of the fact that that position is the correct one. The defendant who naturally has the burden of going forward with the proof of the foreign law as part of his defense can rest without any expense or trouble, and if the plaintiff fails to produce evidence as to the law of Chili proving a negative, the defendant must prevail.

The third possible position is a combination of the first and second. It is like the first when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum. It is like the second when the court of the forum takes judicial notice that the foreign state has fundamentally a different system of law from that of the forum. Thus, in Missouri, Alabama, Arkansas, and New York, it seems clearly to have been held that if the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, the court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both.<sup>1</sup> There are, on the other hand, in all of the above jurisdictions cases<sup>2</sup> which might seem to the casual observer to hold that if the court of the forum takes judicial notice that the law of the foreign state is not based upon the same fundamental system of law as that of the forum, the law of the forum, if there be any, and whatever it may be, whether statutory or otherwise, will always, in the absence of proof of the foreign law, be applied.

There are two good reasons why a court should hesitate before adopting this third position. It is unsound upon principle, and the jurisdictions which at first might seem to support it do so in such an uncertain manner or under such special and peculiar circumstances that it is difficult to regard them as coming out wholeheartedly for any such view.

In Missouri, perhaps more clearly than in any other jurisdiction,

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<sup>1</sup> See cases collected by states in 67 L. R. A. 42, 43, 49, 50, 51.

<sup>2</sup> *Flato v. Mulhall*, 72 Mo. 522; *Sloan v. Torrey*, 78 Mo. 623; *Peet v. Hatcher*, 112 Ala. 514; *Kennelbrew v. So. Auto. Co.*, 106 Ala. 377; *Brown v. Wright*, 58 Ark. 20; *Garner v. Wright*, 52 Ark. 385; *Bradley v. Mutual Benefit Ass'n*, 3 Lans. (N. Y.) 341; *Savage v. O'Neil*, 44 N. Y. 298; *Hynes v. McDermott*, 82 N. Y. 41.

this third position is taken.<sup>1</sup> Nevertheless, we find that Missouri has a peculiar rule that it will only notice that other states which comprise territory originally under the jurisdiction of Great Britain had the common law system and will only presume as to them that the common law is there in force. That leaves Missouri without any presumption at all concerning the law in all of the states west of the Mississippi River.<sup>2</sup> In this respect Missouri is unique among all the states of the Union. Doubtless this curious turn in the rulings of the Missouri court accounts for the illogical position that if the foreign law be not presumed to be the common law, it is presumed to be the same as the law of the forum, even though the law of the forum be a peculiar statutory enactment. In short, one curiosity in the law of Missouri is equalized by another.

The most recent case in Alabama<sup>3</sup> giving countenance to the rule that the law of the forum governs when the law of the non-common law state or foreign country is involved, is a self-confessed *dictum*. All the other cases in Alabama, Arkansas, and New York which seem to support the proposition that the law of the forum governs when the law of the non-common law state or country is involved are, upon careful analysis, explainable without the necessity of adhering to any such rule. The result, in one case at least, is clearly explainable upon the ground that the party who had the burden of proof upon the whole case or defense, and consequently in the ordinary course had the burden of going forward with evidence of the foreign law, did not sustain that burden, and so failed. This case is, therefore, sound upon the application of the first view:

*Brown v. Wright*:<sup>4</sup> Creditors attempted to subject land standing in the wife's name to the debt of her husband. The plaintiffs sought to prove that the land was purchased with the husband's money and was equitably his. It appeared that the land was purchased with the wife's money. The

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<sup>1</sup> *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; *Anneno v. Chicago, R. I. & P. Co.*, 105 Mo. App. 540, hold that where the foreign state is a sister common law state of the forum, east of the Mississippi River, the common law rule will be presumed to be in force, even though by a statute of Missouri the common law in Missouri has been changed. See also many more cases cited in 67 L. R. A. 50. In *Flato v. Mulhall*, 72 Mo. 522, on the other hand, the law of Texas governed, and the court refused to make any presumption as to what the law of Texas was, because it had a system of law fundamentally different from that of the forum. The Missouri court, however, under those circumstances undertook to apply the statutory rule of Missouri in regard to the validity of the parol acceptance of the draft sued on. See also *Sloan v. Torrey*, 78 Mo. 623.

<sup>2</sup> *Ante*, p. 403, note 3.

<sup>3</sup> *Peet v. Hatcher*, 112 Ala. 514.

<sup>4</sup> 58 Ark. 20.

plaintiffs, as a last resort, claimed that, by the law of Texas which governed the transaction, the money used by the wife belonged to her husband. This failed because the court of the forum would not presume the law of Texas was the same as the common law. The court, therefore, properly indulged in no presumption at all, and the plaintiff did not sustain the burden of proof.

In other cases the results are explainable consistently with the first view on the ground that the court of the forum is only presuming the existence in a foreign state of a general principle of law of such universal application that no civilized system of jurisprudence can be thought to be without it:

*Bradley v. Mutual Benefit Ass'n*:<sup>1</sup> Here the burden of proof was on the defendant insurance company to show that the insured was killed while doing an act against the law, for instance, committing an assault upon the person and property of another. The evidence of the act was clear, but no proof was made that the act was unlawful according to the law of Louisiana which governed. The court, however, threw the burden of going forward with evidence that the acts proved were not unlawful by the law of Louisiana upon the plaintiff, and the plaintiff failed. This was a sound result, because the court could fairly assume that by the law of all civilized countries the forcible taking of property from another was unlawful.<sup>2</sup>

*Garner v. Wright*:<sup>3</sup> The plaintiff asserted title under a chattel mortgage governed by the law of Indian Territory. It was held that no presumption could be indulged that the law of Indian Territory was similar to the common law. The court, however, did sustain the plaintiff's right of property by virtue of the mortgage and the taking of possession by him before any other lien attached. This can go upon the ground that every civilized system of jurisprudence recognizes the general principle of the right to transfer personal property. The court practically takes this view in terms.

*Savage v. O'Neil*:<sup>4</sup> Trespass by the plaintiff against the defendant for taking her chattels upon execution against her husband. The husband transferred the goods to the wife to pay a debt he owed her for money loaned him by her. The money was loaned to the husband in New York

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<sup>1</sup> 3 Lans. (N. Y.) 341.

<sup>2</sup> It is submitted that the same explanations should apply to *Kennelbrew v. So. Auto. Co.*, 106 Ala. 377, where the court of the forum threw the burden of going forward, with the law of Louisiana that no implied warranty existed upon the sale of a chattel for a specific purpose, upon the defendant. Here the court of the forum was only assuming that in Louisiana the rational principles of construing contracts recognized in all systems of law was in force.

*Hynes v. McDermott*, 82 N. Y. 41, must, it is submitted, be supported on the same ground.

<sup>3</sup> 52 Ark. 385.

<sup>4</sup> 44 N. Y. 298.

state. A verdict for the plaintiff was sustained assuming the money loaned the husband came to the wife while she and her husband were domiciled in Russia, because the law of Russia was not proved by the defendant. In other words, the court of the forum put the burden of going forward with proof of the law of Russia upon the defendant, because he was attempting to upset a natural right of property or ownership which might be presumed to exist under all systems of law.

This third view is obviously a most illogical development. You start out to recognize that one party to the suit has the burden of proof of his case or defense; that where the fundamental systems of law in the forum and in the foreign state are the same, he is assisted in sustaining that general burden of proof by placing the burden of going forward with evidence upon whosoever wishes to prove the law different from the rule of the system of law common to both the forum and the foreign jurisdiction, *i. e.*, the common law in the usual case. This rests upon a fairly natural assumption, in the large majority of cases, that the common law rule is in force in the foreign state. When, therefore, because the fundamental system of the law of the forum and that of the foreign state are wholly different, there is no longer any rational ground for shifting the burden of going forward. The logical result, therefore, should be that the burden of going forward is upon him who had the general burden of proof of the whole case. Instead, however, of adopting this position, the third view makes a perfectly irrational and arbitrary ground for shifting the burden of going forward by declaring that it shall be on whoever wishes to show that the law of the foreign jurisdiction is different from that of the forum, whatever the law of the forum may be and no matter whether it be the statute law or otherwise.

Finally, the third view has all the hardship and injustice of the second view without any of the advantage which arises from the simplicity and ease in applying the second view. By the third view you still have to make a distinction between foreign states which have a system fundamentally the same as the forum and those which have not. In the latter case the party who has not the burden of proof on the whole case is put to the expense and hardship of sending out to a distant foreign country to negative the existence of a rule of law in force in the forum perhaps by special statute and scarcely by any possibility existing in the foreign state.

In conclusion, then, upon the entire subject: The third posi-

tion is one the existence of which may fairly be doubted, and which, if it does exist, is an irrational and inconsistent development, heaping an unjust burden upon one who ordinarily does not have to go forward with proof in the first instance. The second is extreme but consistent, and has some advantages of certainty in its application. Its fault is that it also, without any adequate ground, places a burden of going forward with evidence upon the party who ordinarily does not have to do so.

The first position, on the contrary, presents a rational and logical development of the law. It does more accurate justice between the parties by leaving the natural burden of going forward with evidence where it belongs unless there is a good reason for changing it. It has also, it is submitted, the support of such eminent judges as Lord Eldon, Chancellor Kent, and, more recently, Mr. Justice Holmes.

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